

# Overview of State/Tribal Assumption of the CWA §404 Program

OWCD MEETING NOVEMBER 1, 2017

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- WHAT IS IT?
- REQUIREMENTS
  - EPA ROLE
- APPROVAL PROCESS
- CURRENT ACTIVITIES



# What is Assumption?

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➤ CWA §404 – regulates the discharge of dredged or fill material to Waters of the US.

➤ States and tribes may **assume** administration of the permit and enforcement program for certain waters\*

➤ This is not delegation – program, approved by EPA, operates and issues permits under state authorities. (Statute & Regulations: CWA §404(h); 40 CFR part 233)

➤ Status

➤ Two states, MI and NJ

➤ Working with FL, others interested

\* Corps retains permitting authority for: Waters presently used, or susceptible to use (either in natural condition or with reasonable improvement) as a means to transport interstate or foreign commerce and their adjacent wetlands. They also retain all *tidal waters and their adjacent wetlands*.

# Requirements

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➤ State or Tribal programs must be:

- consistent with and
- no less stringent than the Act and implementing regulations

➤ State or Tribal programs must:

- Have equivalent scope of jurisdiction\*
- Regulate at least the same activities
- Provide for sufficient public notice and allow public participation
- Ensure compliance with the CWA 404(b)(1) guidelines
- Have adequate enforcement authority

\* State or tribal program may have broader jurisdiction; however, the approved 404 program will have the same jurisdictional scope

## EPA's Role

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### ➤ Prior to assumption

- Work with states to enhance capacity/capability and develop programs
- Wetland Program Development Grants

### ➤ Evaluate and approve/disapprove state assumption request

### ➤ Oversight of assumed program

- Coordinate federal oversight of permits
  - EPA notified of all permit applications; reviews categories of projects
  - EPA coordinates USACE, USFWS, & NMFS comments
  - State or tribe must resolve EPA concerns prior to issuing a permit
- Review of modifications of state program
- Withdraw program approval, if needed

EPA cannot waive review of:

Draft general permits

Discharges that may impact endangered species

Discharges that may adversely impact waters of another state

Discharges with known or suspected toxic or hazardous pollutants

Discharges proximal to public water supply intakes

Discharges within critical State/Federal areas

# Approval Process

(120 days)

## Current Activities

- Florida Assumption Effort
  - Timeline - issuing permits mid-December 2018
- Revisit proposed revisions to MI's 404 program –Governor letter 10/11/17
- Administration Support
  - Cooperative federalism
  - Agency Strategic Plan and OW NPG
- Follow-up: Federal Advisory Subcommittee on Assumable Waters
  - EPA established NACEPT\* subcommittee (9/15), seeking recommendation on how EPA could clarify on which waters states assume.
  - 2 majority and 2 minority recommendations sent to Administrator (6/17)
  - Need to resolve and choose path forward

\* National Advisory Council for Environmental Policy & Technology

Charge: "... to provide advice and recommendations to EPA on how to clarify for which states and tribes will assume CWA section 404 permitting responsibilities, and for which waters the USACE will retain permitting authority."

### Majority recommendations:

Waters to be retained – Primary Dependence on Rivers and Harbors Act Section 10 Lists of Navigable Waters to Define USACE Retained Waters. (Waters Alternative B)

Wetlands to be retained -- USACE Retains All Wetlands Landward to an Administrative Boundary Established During the Development of the Memorandum of Agreement with the USACE, with a 300-foot National Administrative Boundary as a Default. (Wetlands Alternative C3)

### USACE recommendations:

Waters to be retained – Section 10 waters plus CWA (a)(1) TNW Waters as Retained Waters. (Alternative C )

Wetlands to be retained – USACE Retains All Adjacent Regardless of Furthest Reach. (wetlands Alternative A)

## Approval Process

